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No. 90-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FLEET FACTORS CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AND THE CALIFORNIA BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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ISSUE PRESENTED

Does a lender, who neither forecloses on a borrower's real property nor involves itself in the day-to-day management of the borrower's facility, become liable under the federal Superfund statute for environmental response costs incurred at the borrower's facility?

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INTEREST OF THE AMICI CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the commercial banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money centers, regional and community banks. ABA members hold approximately ninety-five percent of the domestic assets of United States banks.

The California Bankers Association ("CBA") is a trade association incorporated under the laws of the State of California. Virtually every state and federally chartered commercial bank doing business in the state (approximately 420 institutions) is a member of CBA. As a result, CBA is necessarily concerned with judicial matters that affect the business of its members, including litigation involving liability for financial institutions under CERCLA. The published opinion of the Eleventh Circuit Court of Appeals in this lawsuit is such a matter.

The Eleventh Circuit is one of only two federal appellate courts to analyze the responsibility of lenders under the federal Superfund law for the cost of removing hazardous substances from their borrowers' property. The ruling below increases banks' exposure to liability by virtually eliminating the statute's specific exemption for secured creditors and by articulating a standard which is so vague that current lending practices are called into question.

The amici are in a unique position to express the views of financial institutions with respect to the issues raised in this case. Commercial lending is the cornerstone of their members' business, and the banking industry—innocent of having polluted borrowers' property—will, nevertheless, likely bear the costs of cleanups and the brunt of adverse consequences which will result if this decision is allowed to stand. The American Bankers Association and the California Bankers Association, on behalf of their members, appear here, with consent of the parties,[1] to urge the

[1] Consent letters from both parties are filed herewith in the office of the Clerk.

Court to grant the Petition for Writ of Certiorari in this case.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's[2] opinion in this case construes a key provision of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund"). 42 U.S.C.A. §§ 9601 to 9675 (West Supp. 1990). This statute governs the liability for the cost of removing hazardous substances from polluted property. At issue is the scope of 42 U.S.C.A. section 9601(20)(A) which exempts secured creditors from a class of persons (owners or operators) liable under Superfund. Because this ruling is one of the few federal appellate decisions construing this section, the court's reasoning will inevitably be looked upon as an authoritative statement of CERCLA's applicability to secured lenders.

Collateralized lending is the backbone of the commercial banking business. At the end of the second quarter of 1990, federally insured commercial banks had over $620 billion of commercial and industrial loans on their books as well as over $800 billion in real estate loans. Federal Deposit Insurance Corporation, *Quarterly Banking Profile* (Second Quarter 1990) at 3. The Eleventh Circuit's vague and overly broad holding calls into question the traditional relationship and practices between secured lenders and

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[2] It is interesting to note that only one Judge of the United States Court of Appeals for the Eleventh Circuit decided this case. Circuit Judge Vance was assassinated during the pendency of the appeal and Senior District Judge Lynne of the United States District Court for the Northern District of Alabama sat on the panel by designation.

their borrowers and makes it very difficult for the lending community to determine how to avoid environmental liability.

The inevitable result of this confused state of the law is to reduce the availability of credit and increase the costs of loan transactions. Certain classes of borrowers will be unable to obtain financing at any price. Borrowers experiencing financial difficulties will find their lenders much less willing to use their financial expertise or offer advice for fear that these actions will trigger environmental liability. At a time when many regions of the country are in the throes of a real estate recession (in some states over ten percent of the banks' real estate loans are non-current), the banking industry can ill afford uncertainty and risks presented by the Court of Appeals' ruling. *See* American Banker, October 15, 1990, at 25 col. 1.

Relatively few courts have considered the scope of the exemption for secured creditors contained in 42 U.S.C.A. section 9601(20)(A). Until the ruling in this case, however, most lenders conducted business under the assumption that liability would not arise unless they "operated" the contaminated facility or became an "owner" of the facility through foreclosure. *United States v. Mirabile*, 15 Envtl. L. Rep. 20,994 (E.D. Pa. Sept. 4, 1985) ("day-to-day" participation in the operational aspects of the site necessary to trigger liability); *United States v. Maryland Bank and Trust*, 632 F. Supp. 573 (D. Md. 1986) (exemption in CERCLA for secured lenders no longer applicable where lender forecloses and becomes "owner" of contaminated property). While the banking industry does not agree with the holdings in these cases, they do establish certain parameters for determining when lia-

bility will arise. The expansive language of the decision in this case introduces an unacceptably high level of uncertainty and essentially removes CERCLA's protection for secured lenders.

The amici will not burden the Court with a repetition of points which have been more than adequately covered in the Petitioner's brief. For the purposes of this brief, it is sufficient to note that the standard adopted by the Court of Appeals[3] has sent shock waves through the lending community and mobilized the financial services industry to seek clarification from Congress. The Court of Appeals' opinion has generated a tremendous negative reaction and is probably the key reason for the widespread support of legislation to amend CERCLA.

In the House of Representatives, Congressmen John J. LaFalce has introduced a bill to protect lenders and to help small businesses that are finding it extremely difficult to obtain financing. H.R. 4494, 101st Cong. 2d Sess., 136 Cong. Rec. H1505 (1990). Senator Jake Garn has introduced similar legislation in the Senate. S. 2827, 101st Cong. 2d Sess., 136 Cong. Rec.

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[3] The Court of Appeals held that "a secured creditor may incur liability . . . if its involvement with the management of the facility is sufficiently broad to support the inference that it *could* affect hazardous waste disposal decisions if it so chose." *United States v. Fleet Factors Corp.*, 901 F. 2d 1550 at 1557-58 (11th Cir. 1990) (footnotes deleted, emphasis added). The other federal circuit court to consider this issue is in direct conflict with the Eleventh Circuit on this precise point. It adopts a narrower standard by noting that "there must be *some actual* management of the facility before a secured creditor will fall outside the exception." *In re Bergsoe Metal Corporation*, 910 F.2d 668, 672 (9th Cir. 1990) (emphasis added).

S9171 (1990). As of October 2, 1990 H.R. 4494 was co-sponsored by 287 members of the House. (LEXIS, Genfed library, Bill Tracking file.)

At a June 7 hearing on H.R. 4494 before the House Committee on Small Business, Representative LaFalce, the first sponsor of a Superfund bill, stated that he "introduced . . . H.R. 4494 [to] overturn the recent court decisions and *restore Congress' original intent* in enacting Superfund. In essence, my bill would bring the law back to the way it was before 1986, when courts first started expanding Superfund liability." *Hearing on the Impact of Superfund Lender Liability on Small Businesses and Their Lenders Before the House Comm. on Small Business*, 101st Cong., 2d Sess. (1990) (emphasis added). The decision in this case prompted Representative LaFalce to comment that "I fear the day is near when the security interest exemption that Congress enacted as part of Superfund will be rendered meaningless by these expansive judicial decisions." *Id.*

The witnesses who appeared before the committee included bankers, attorneys and representatives of small businesses. The testimony was uniform in demonstrating the negative impact of the unwarranted narrowing of the secured lender exemption. The witnesses indicated that not only were borrowers being denied credit but that some banks faced significant threats to their capital by being named in cleanup actions. Garsson, *Liability Lid for Cleanups Stalls in D.C.*, American Banker, June 8, 1990, at 16 col. 2.

The criticism of the recent court cases and the Congressional reaction has even caused the Environmental Protection Agency (EPA) to rethink its position on lender liability. In testimony on August 2,

James M. Strock, EPA's Assistant Administrator for Enforcement, stated that "we believe we understand the legitimate concerns being expressed." In addition, Strock noted that "[u]nder our current thinking . . . we believe that where a lender is acting in a custodial capacity in administering and winding down affairs of a borrower . . . actions taken to responsibly manage the property upon learning of any contamination should not trigger liability. Similarly, selling off collateral would not, by itself, trigger liability." *Hearing on H.R. 4494, To amend the Comprehensive Environmental Response Compensation and Liability Act of 1980 to Limit the Liability Under that Act of Lending Institutions Acquiring Facilities through Foreclosure or Similar Means and Corporate Fiduciaries Administering Estates or Trusts Before the Subcomm. on Transportation and Hazardous Materials of the House Comm.on Energy and Commerce*, 101st Cong., 2d Sess. (1990). *See EPA Official Tells House Panel of Shift in Policy Towards Lenders, CERCLA Liability*, 21 Env't Rep. 756 (BNA) (1990).

The EPA has also gone so far as to draft a proposed interpretive rule to define the secured creditor exemption. Though the draft rule has not been officially released for comment, the contents have been widely reported in the trade press. Noah, *EPA Proposal Could Ease Lender Liability*, Wall Street J., October 10, 1990 at B2 Col. 1. Among other provisions in the draft rule is a statement that " 'participation in management' under the nation's Superfund law does not include 'the mere capacity or ability to influence facility operations.' " Kleege, *EPA Easing Its Stance on Lender Liability*, American Banker, October 10, 1990 at 12 col. 1. *See also* Daily Rep. for

Executives at M1 (BNA) (October 11, 1990) (EPA Draft Proposal reprinted in full).

Despite all the machinations by the Legislative and Executive Branches on this issue, there is still need for this Court to grant the petition in this case. The amici respectfully submit that the activity following in the wake of the Court of Appeals' decision is precisely the reason why it is necessary for this Court to speak authoritatively on this issue.

To begin, it is clear that a significant portion of the United States Congress (as reflected by H.R. 4494's 287 co-sponsors) has rejected the decision in the case below. It even appears that the EPA, the agency charged with enforcing the statute at issue, does not support the Court of Appeals' interpretation. While this suggests that the lending community might obtain relief in the near future, the reality of the legislative and administrative processes counsels against optimism.

While members of both the House and Senate have indicated a desire to clarify the scope of the secured lender exemption, it is unlikely that any legislation will be forthcoming before the end of this session of Congress. Any proposed legislation will have to be reintroduced in the 102d Congress and there is no telling how long the process could take or whether it would provide retroactive relief.[4]

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[4] The Court has, in numerous cases, been asked to interpret federal statutes which are being used in ways not originally contemplated by Congress. For example, on the civil use of the federal racketeering law (RICO) this Court has noted that "RICO is evolving into something quite different from the original conception of its enactors." *Sedima, S.P.R.L. v. Imrex Company,*

The prospects for administrative relief from the EPA may be brighter but the benefits are likely to be narrower than a legislative solution. Although there is a proposed draft rule, there is no indication when, if ever, the rule will be circulated for public comment. Even if a final rule is adopted by the EPA there is some question as to the binding nature of the EPA's interpretation of CERCLA on private parties who seek to recover cleanup costs from lenders. This Court, as the final interpreter of federal statutes, is in the best position to clarify the meaning of *existing* law and return some semblance of certainty to the currently confused state of the law.

CONCLUSION

The Eleventh Circuit's decision in this case has wreaked havoc upon commercial practice and the relationship between secured creditors and their borrowers. The lending community's fear of being liable for environmental response costs has already restricted available credit and increased transaction costs for lenders and borrowers and that will continue to be the case for as long as this decision stands.

Inc., 473 U.S. 479, 500 (1985). In the years since this decision there have been several attempts at civil RICO reform, most recently H.R. 5111, 101st Cong. 2d Sess., 136 Cong. Rec. H4030 (1990) and S.438, 101st Cong 1st Sess., 135 Cong. Rec. S1642 (1989). The fact that legislation may be the most appropriate solution is no guarantee that Congress will act. *See also H.J. Inc. v. Northwestern Bell Telephone Company*, ___ U.S. ___, 109 S. Ct. 2893 (1989) (case illustrating the still festering problems of RICO).

Clarity needs to be returned to this area of the law and we respectfully urge the court to begin the process by granting the Petition for Writ of Certiorari.

Respectfully submitted,

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